SUPREME COURT U. S.

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IN THE

Supreme Court of the United States

October Term, 1969

No. 553

BURTON G. HACKNEY,
COMMISSIONER OF PUBLIC WELFARE,
STATE OF TEXAS, ET AL.
Appellants

vs.

MARGARITA MACHADO, ET AL.
Appellees

On Appeal From the United States District Court For the Western District of Texas

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

October Term, 1969

No. .....

BURTON G. HACKNEY, Commissioner of Public Welfare, State of Texas; WILL BOND, Chairman of the State Board of Public Welfare, State of Texas; W. KENDALL BAKER, Vice-Chairman of the State Board of Public Welfare, State of Texas; and RAYMOND CHEVES, Director of Region 4 of the State Department of Public Welfare, State of Texas, Individually and in their official capacities

Appellants

vs.

MARGARITA MACHADO, individually and on behalf of her minor children and on behalf of needy dependent children similarly situated, et al.,

Appellees

On Appeal From the United States District Court For the Western District of Texas

JURISDICTIONAL STATEMENT

Appellants' appeal from a portion of the judgment of the specially constituted United States District Court for the Western District of Texas entered on June 10, 1969, which requires the Department of Public Welfare of the State of Texas to keep recipients

of Aid for Dependent Children on the welfare rolls during the entire period of the administrative appeal, and through the end of the month in which the final decision is reached. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

OPINIONS BELOW

The per curiam opinion for the Western District of Texas is attached hereto as Appendix A. Copies of the judgment are attached hereto as Appendix B.

JURISDICTION

This suit was brought on behalf of Appellee, Margarita Machado, individually and in behalf of her minor children and all others similarly situated, and Ladislado Lupe Torres intervened pursuant to Rule 24 of the Federal Rules of Civil Procedure for injunctive and declaratory relief under the authority of 42 U.S.C., Sec. 1983, 42 U.S.C., Sec. 301, 28 U.S.C., Sec. 1343 (3) and (4) and Sec. 2201.

A three-judge court was convened pursuant to 28 U.S.C., Sec. 2281 and 2284. The suit was brought for injunctive and declaratory relief against a welfare practice authorized by Texas Statutes which permit the termination of welfare grants by the welfare worker, after investigation and confrontation with recipient of facts of case and recipient is notified of right to appeal, on the ground that said practice violates the 14th Amendment to the United States Constitution, the Social Security Act, and Title 42 U.S.C., Sec. 301, et seq. The judgment of the District Court was en-

tered on June 10, 1969, and Notice of Appeal was filed on July 7, 1969.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C., Secs. 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal to this Court: *United States v. Georgia Public Social Services Commission*, 371 U.S., 285, 287 (1963); *Florida Lime and Avocado Growers v. Jacobsen*, 263 U.S. 73, 75-76 (1960).

CONSTITUTION AND STATUTES INVOLVED

Article 695(c), Sec. 25, Texas Revised Civil Statutes Annotated, 1925, as amended, set forth in Appendix C.

Sec. 51 of Article III, Constitution of Texas, set forth in Appendix D.

Sec. 51a of Article III of the Constitution of Texas, Appendix E.

QUESTION PRESENTED

Do the provisions of Article 695(c), Sec. 25, Vernon's Texas Civil Statutes, 1925, as amended, and the rules and regulations issued pursuant thereto by the Texas State Department of Public Welfare afford a procedure sufficient to meet the requirements of the Social Security Act, Title 42 U.S.C., Sec. 301, et seq.?

THE QUESTION IS SUBSTANTIAL

The fundamental question in this case is whether the provisions of Article 695(c), Sec. 25, Vernon's Texas Civil Statutes, 1925, as amended, and the rules

and regulations issued pursuant thereto by the Texas Department of Public Welfare afford a procedure sufficient to meet the requirements of the Social Security Act, Title 42 U.S.C., Sec. 301, et seq.

This case is but one of an increasing number of suits concerning similar welfare procedures pending in courts throughout the country.[1]

The question here is substantially the same as in *Wheeler v. Montgomery*, No. 634, and *Kelly, et al. v. Wyman, et al.*, both of which cases are now pending before this Court, on the question of whether or not a welfare recipient had been afforded due process; whereas the instant case deals with the statutory-regulatory aspects of welfare procedure. The *Wheeler v. Montgomery* case, supra, held that the California Welfare and Institutions Code (which is similar to Texas welfare procedures) afforded due process as provided by the Fourteenth Amendment.

In addition to the conflict in decisions already present, the possibility of further conflict and confusion

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[1] *McCullough, et al. v. Terzian, et al.*, No. 379011 (Calif. Super. Ct., Alameda Cty., May 2, 1968); *Kelly, et al. v. Wyman, et al.*, Civ. No. 394/68 (S.D.N.Y., May 17, 1968); *Sheafe, et al. v. Wyman, et al.*, Civ. No. 864/68 (S.D.N.Y., May 17, 1968); *Williams, et al. v. Gandy, et al.*, Civ. No. GC 6728 (N.D. Miss., filed June 9, 1967); *Lage, et al. v. Downing, et al.*, Civ. No. 7-2089-C-2 (S.D.Ia., filed Oct. 30, 1967); *Sprayberry, et al. v. Dulaney, et al.*, Civ. No. 11662 (N.D. Ga., filed March 19, 1968); *Jackson, et al. v. Dept. of Public Welfare of the State of Florida, et al.*, Civ. No. 68-568-Civ. E.C. (S.D. Fla., filed May 20, 1968); *Van Blaricum v. Dept. of Public Welfare of the State of Ohio, et al.*, No. 68-78 (S.D. Ohio, March 8, 1968); *Moore, et al. v. Houston*, No. 104435 (Cir. Ct. Wayne Cty., Mich., filed Feb. 23, 1968); and *Diaz, et al. v. Dunn, et al.*, No. 68411F (D. Mass. filed May 15, 1968).

which will result on July 1, 1970, when C.F.R. 45, Sec. 205.10 (Appendices F and G) becomes effective, hastens the need for Supreme Court guidance.

STATEMENT

Appellants are not appealing that portion of the judgment relating to Appellees, Margarita Machado and Ladislado Lupe Torres. This appeal is limited to those portions of the judgment which state:

> "(1) The portion of Article 695(c) §25, TEX. REV. CIV. STAT. ANN., and the regulations issued pursuant thereto by the defendants herein, which authorize and require termination, suspension or reduction of aid to recipients of Aid to Families with Dependent Children without affording said recipients a prior hearing, and without affording said recipients a continuation of assistance during the period of the appeal and through the end of the month in which the final decision after the hearing is reached, violate the Social Security Act, Title 42 U.S.C. §301 et seq., and the regulations promulgated thereunder."

and ". . . it being this Court's purpose to make Title 45 C.F.R. §205.10, applicable to the class herein represented as of the date of its per curiam opinion on May 12, 1969, rather than the proposed effective date of October 1, 1969," as the same relates to those individuals which are ultimately determined to be ineligible to receive aid under the provisions of the Social Security Act, Title 42 U.S.C. §301 et seq., and Article 695(c), Sec. 25, Texas Revised Civil Statutes, 1925, as amended.

ARGUMENT AND AUTHORITIES

A person is entitled to receive welfare payments only so long as he is a member of that class of persons which the Constitution of Texas states may be paid welfare funds, Article III, Sec. 51a, Constitution of Texas. This section of the Constitution provides an exception to Article III, Sec. 51 which prohibits grants of any public money to "any individual, corporation or association of individuals whatsoever."

According to the record in this case, 644 Welfare cases were appealed during the year of 1967, in which cases the worker was sustained in 227 cases, and 368 cases were reversed (P. 59, Department of Public Welfare Annual Report, 1967).

It is therefore respectfully submitted that the judgment of the Court requires payment of benefits to individuals who are finally adjudged not to be eligible under the Social Security Act, Title 42 U.S.C., Sec. 301 et seq. Such judgment, therefore, requires payment of both federal and state funds not authorized by any federal or state legislation and the payment of which is specifically prohibited by Sec. 51 of Article III of the Constitution of Texas.

Furthermore, the procedures provided by the provisions of Article 695(c), Sec. 25, Vernon's Texas Civil Statutes, 1925, as amended; and the rules and regulations issued pursuant thereto by the Texas Department of Public Welfare actually afford a double hearing to the Welfare recipient. In the first instance, prior to the suspension of payment of the grant, the recipient is notified by the worker that the grant is to be terminated and the reasons for its termination. In

addition, the recipient also has the right of going over the reasons for termination with the worker's supervisor, if desired. At these conferences the recipient is entitled to refute the worker's conclusions and have the suspension of payment order revoked. If this is not done, there is still the right of appeal. The appeal is conducted by an impartial hearing examiner, generally the Director of the Region. The hearing examiner can set aside the action of the worker and reinstate the payment, if evidence warrants it. At this hearing the appellant is entitled to present witnesses, to confront the witnesses furnishing adverse information, to be represented by counsel of his own choice with the counsel having the right to fully represent the appellant, including the presentation of witnesses and cross-examining witnesses who have presented adverse testimony.

This Court in the case of *Consolidated Edison Co., et al. v. National Labor Relations Board*, 305 U.S. 197, 59 S.Ct. 206 (1938), set out the general rule and cited cases that "due process" does not require an opportunity to be heard before judgment if defenses may be presented on appeal. It was stated that this rule assumes that the appellate review affords opportunity to present all available defenses including the lack of proper notice.

We feel that the facts in this case reflect complete protection of recipient's rights and that the rules and procedures actually followed by the Department of Public Welfare clearly afford procedural due process to each recipient of welfare aid, or for those seeking to obtain it.

It would seem that the burden of establishing eligibility to become a member of the favored class of citi-

zens entitled to receive a grant of public money of the State of Texas would rest upon the person seeking such a grant. It would, likewise, appear that the duty of establishing continued membership in such class would rest on the recipient and he should be required to prove his right to remain as a member of such class.

The questions presented are therefore substantial and require unauthorized payment of trust funds while denying to those authorized to receive the trust funds money which would otherwise be available.

CONCLUSION

It is respectfully prayed that the Court should review the judgment of the District Court and enter a judgment reversing the decision below.

Respectfully submitted,

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Attorney General of Texas

NOLA WHITE
First Assistant Attorney General

HAWTHORNE PHILLIPS
Executive Assistant Attorney General

J. C. DAVIS
Assistant Attorney General

JOHN H. BANKS
Assistant Attorney General

Attorneys for Appellants

CERTIFICATE OF SERVICE

I, Hawthorne Phillips, one of the attorneys for the appellants, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ---------- day of ----------, 1969, I served a copy of the foregoing Jurisdictional Statement on the appellees by depositing a copy in the United States Mail as certified mail with postage prepaid and addressed to the attorneys of record for said appellees as follows: Honorable Lonnie W. Duke, Staff Attorney, Legal Aid Department, Room 212, Bexar County Courthouse, San Antonio, Texas; and Honorable Richard E. Kammerman, Attorney at Law, 5005 Manor Road, No. 102, Austin, Texas.

HAWTHORNE PHILLIPS
Executive Assistant Attorney
General of Texas

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. 68-108-SA

MARGARITA MACHADO, ET AL.

v.

BURTON G. HACKNEY, ET AL.

FOR PLAINTIFF: LONNIE W. DUKE, San Antonio, Texas

FOR INTERVENOR: RICHARD KAMMERMAN, Houston, Texas

FOR DEFENDANTS: HAWTHORNE PHILLIPS and JOHN BANKS, Austin, Texas

BEFORE: JOHN R. BROWN, Chief Judge, United States Court of Appeals, Fifth Judicial Circuit, ADRIAN A. SPEARS, Chief Judge, United States District Court and JACK ROBERTS, United States District Judge.

PER CURIAM: This is an action for injunctive and declaratory relief pursuant to 42 U.S.C. 1983 to secure rights, privileges, and immunities established by the Fourteenth Amendment of the Constitution of the United States and the Social Security Act, 42 U.S.C.

301, *et seq.* and the regulations promulgated thereunder. The declaratory judgment aspect of the action is pursuant to 28 U.S.C. 2201.

Plaintiff Margarita Machado, an adult citizen of the United States residing in Bexar County, Texas, and a mother of several minor children, brings this action in her own behalf, in behalf of her minor children, and pursuant to Rule 23 of the Federal Rules of Civil Procedure, in behalf of all other persons similarly situated. Ladislado Lupe Torres intervenes pursuant to Rule 24 of the Federal Rules of Civil Procedure individually and in behalf of her minor children.

Defendant Will Bond is Chairman of the State Board of Public Welfare and Defendant W. Kendall Baker is the Vice-Chairman of said Board. Under TEX. REV. CIV. STAT. ANN. art. 695c, §§3-9, they are responsible for the adoption of the policies, rules and regulations for the government of the State Department of Public Welfare and are charged with the administration of the welfare activities of the state as provided by statute. Defendant Burton G. Hackney is Texas Commissioner of Public Welfare and has statutory responsibility to discharge all administrative and executive functions for the State Welfare Department. Defendant Raymond Cheves is Regional Director of Region 4 of the State Department of Public Welfare and is responsible for enforcing the regulations of the State Department of Public Welfare and is the agent of defendant Hackney in the administration of the Aid to Families with Dependent Children in the City of San Antonio, Bexar County, Texas.

Since plaintiffs and intervenors seek injunctive relief restraining the defendant officers from the en-

forcement, operation and execution of a state statute[1] and of a statewide regulation (the so-called "substitute father" regulation) set forth in §2642.60 of the Texas Department of Public Services[2] and promulgated pursuant to a state statute (TEX. REV. CIV. STAT. ANN. art. 695c) on the grounds of unconstitutionality, a three-judge court was convened, pursuant to 28 U.S.C. 2281, for hearing and determining this action. Jurisdiction is conferred on the Court by 28 U.S.C. 1343 (3-4).

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[1]TEX. REV. CIV. STAT. ANN. art. 695c, §25:

(1) In the event that an application for public assistance by a needy blind person, a needy aged person, or with respect to a needy dependent child, is not acted upon by the local unit of administration within a reasonable time after the filing of such an application, or is denied in whole, or in part, or any award of assistance is modified or cancelled, or an applicant or recipient is dissatisfied with any action or failure to act on the part of the local administrative unit, the applicant or recipient shall have the right to appeal to the State Department and shall be granted a reasonable notice and opportunity for a fair hearing before the State Department.

(2) Within a reasonable time prior to an applicant's or recipient's appeal hearing he, or his authorized agent, shall be fully advised of the information contained in his record on which action was based if a request for such information is made in writing, and no evidence of which the applicant or recipient is not informed shall be considered by the State Department as the basis for a decision after a hearing.

[2] 2642.60 *Stability of Relationship*

Continuing pregnancies in the face of alleged lack of a father in the home is a strong indication that the designated relative has formed some stable relationship with a man who presumably functions as a father or a father substitute in the home to the children and an ADC grant may not be initiated or continued until it is established that no such arrangement is currently in effect.

The relevant facts of this case are simple and have been stipulated. Plaintiff Machado received AFDC benefits through December, 1967. In December, a caseworker for the Texas State Department of Public Welfare, after investigation, advised Mrs. Machado that her assistance was being terminated, there being a "substitute father" for her children. Mrs. Machado received no aid for January and February, 1968. In March, 1968, she applied again for welfare and was reinstated. In April, 1968, she appealed the December decision so that she could receive payments for January and February, 1968. The appeal, pursuant to TEX. REV. CIV. STAT. ANN. art 625c, §25, was unsuccessful.

For the purposes of this opinion, Mrs. Torres, who was suspended February, 1968, presents to the Court basically similar facts except that she has not yet been reinstated on the welfare rolls.

Plaintiff and intervenor challege the validity of the "substitute father" regulation, the regulation used to deny them AFDC benefits. After the filing of this suit and prior to oral argument, the Supreme Court, in *King v. Smith*, 392 U.S. 309 (1968), found that a similar Alabama regulation was inconsistent with the So-

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In instances of a mother applying for an illegitimate child, an ADC grant cannot be placed until the mother has made an effort to bring the father into the office to discuss plans for the child.

When the mother of an ADC child is cohabiting with a man, the grant will be denied on the basis that the child is not deprived of parental support. A grant may not be initiated or reinstated until it is established that the relationship has been terminated. Normally, a six months' period of time accompanied with evaluation of all other pertinent facts should make possible a decision as to whether the relationship is broken.

cial Security Act, 42 U.S.C. 601 *et seq.* That decision clearly controls part of this case; defendants admitted in oral argument that the Texas regulation can no longer be used to deny AFDC benefits. There remains, however, the question of what, if any, retroactive effect should be given the decision. Or, stated another way, who, if anyone, that has been denied welfare assistance because of the application of an invalid provision is to receive back payments. This Court is satisfied that not everyone denied benefits as a result of the "substitute father" regulation should receive back payments, for this would create a great financial burden on the State while rewarding those who have not diligently protected their rights. However, to protect those that have been diligent, the Court ORDERS the defendants to pay to Mrs. Machado and Mrs. Torres all past benefits denied them because of the "substitute father" regulation. These benefits may be decreased by the amount of financial support actually supplied by the "man in the house."

Plaintiff and intervenor also challenge the procedure under which the defendants take recipients off welfare without benefit of a prior hearing, alleging a violation of the Due Process Clause of the Fourteenth Amendment. TEX. REV. CIV. STAT. ANN. art. 625c, §25 has been interpreted so as to provide for the following procedure:

A caseworker notifies the recipient in person of the termination of her benefits and gives reasons therefor. The caseworker instructs the recipient of her right to appeal. An appeal is perfected if within ninety (90) days the recipient notifies the Appeal Board in Austin, Texas, in writing of her desire to appeal. This is normally accomplished by the recipient signing and mail-

ing a "Petition to Appeal", a form provided by the State Welfare Department. The recipient is then notified of a hearing date. At the hearing the recipient is entitled to have counsel present, call witnesses to testify in her behalf, cross-examine witnesses called by the Welfare Department and to be furnished with a transcript of the proceedings. At the conclusion of this hearing, a transcript is prepared along with the hearing examiner's recommendations and sent to the State Welfare Appeal Board, where an Appeals Analyst summarizes the facts of the case and the applicable regulations and statutes for the Board's review and determination. After a decision is rendered by the Appeal Board, a letter is sent to the recipient notifying her of the Board's decision. If a favorable decision is received, the recipient will be given all payments withheld. An Appeal of an adverse decision can be taken to the State Courts if the "order violates a constitutional right or adversely affects a vested property right," there being no specific statutory provision for appeal to State Courts. *Stone v. Texas Liquor Control Board*, 417 S.W. 2d 385 (Tex. Sup. 1967).

A three-judge court in the Southern District of New York (*Kelly v. Wyman*, 294 F. Supp. 893 at p. 901 (S.D. N.Y. 1968)) recently considered the question of whether or not the New York City Welfare Department could terminate the aid to recipients of AFDC, without affording them a prior hearing and held that the procedure there followed, which is similar to that used in Texas, and outlined above, fails to adequately protect the recipient's rights.

We agree with the result reached in the *Kelly* case, but our holding is predicated upon the statutory-regulatory aspects of this case, rather than on broad con-

stitutional grounds.[3] See *King v. Smith*, supra, at 313. Adequate protection to the recipient can only be accorded, in situations such as those presented in the instant case, by a continuation of the assistance during the period of the appeal and through the end of the month in which the final decision, after the hearing, is reached.[4]

Counsel for plaintiff is directed to prepare an appropriate judgment consistent with this opinion.

Signed this 12th day of May, 1969.

ADRIAN A. SPEARS,
United States District Judge, acting for and on behalf of all three judges designated to hear and determine this cause, with full authority from each such judge to so act.

A true copy of the original, I certify.

DAN W. BENEDICT, Clerk

BY : FRANCES MANLEY, Deputy.

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[3]This holding shall apply retroactively to the plaintiff and intervenor, but it shall apply to the class represented by them in a prospective manner only.

[4]It is significant to note that a new regulation has been adopted by the Department of Health, Education, and Welfare, which provides, in pertinent part, that:

"Effective October 1, 1969, a State plan for OAA, AFDC, AB, APTD, AABD, or MA under the Social Security Act must provide that:

(1) When a fair hearing is requested because of termination or reduction of assistance, involving an issue of

fact, or of judgment relating to the individual case, between the agency and the appellant, assistance will be continued during the period of the appeal and through the end of the month in which the final decision on the fair hearing is reached. (If assistance has been terminated prior to timely request for fair hearing, assistance will be reinstated.) Where delays are occasioned during the period of the appeal, assistance will be continued if the delay is at the instance of the agency or because of illness of the claimant or for other essential reasons. To the extent that there are other delays at the request of the claimant the agency may but is not required to continue assistance." (Vol. 34 Fed Register No. 16, page 1144).

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. 68-108-SA

MARGARITA MACHADO, ET AL.

v.

BURTON G. HACKNEY, ET AL.

JUDGMENT

This cause came on for final hearing on the complaint herein praying for injunctive and declaratory relief pursuant to Title 42 U.S.C. §1983, to secure rights, privileges, and immunities established by the Fourteenth Amendment to the Constitution of the United States and the Social Security Act, Title 42 U.S.C. §301 et seq., and the regulations promulgated thereunder. Jurisdiction is conferred on this Court by Title 28 U.S.C. §§1343(3) and (4) and also by Title 28 U.S.C. §2201 relating to declaratory judgments and Title 28 U.S.C. §§2281 and 2284 relating to three-judge courts. After having considered the evidence, the briefs and the arguments of counsel, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

(1) The portion of Article 695(c), §25, TEX. REV. CIV. STAT. ANN., and the reg-

ulations issued pursuant thereto by the defendants herein, which authorize and require termination, suspension or reduction of aid to recipients of Aid to Families with Dependent Children without affording said recipients a prior hearing, and without affording said recipients a continuation of assistance during the period of the appeal and through the end of the month in which the final decision after the hearing is reached, violate the Social Security Act, Title 42 U.S.C. §301 et seq., and the regulations promulgated thereunder.

(2) It will be presumed that the defendants, Burton G. Hackney, Commissioner of Welfare; Will Bond, Chairman of State Board of Public Welfare; and Raymond Cheves, Regional Director of Region 4 of the State Department of Public Welfare, individually and in their representative capacities, their successors in office, agents and employees, will abide by this judgment and refrain from suspending, or reducing the aid to each recipient of Aid to Families with Dependent Children without affording a prior fair hearing and a continuation of assistance during the period of the appeal and through the end of the month in which the final decision after the hearing is reached; it being this Court's purpose to make Title 25 C.F.R. §205.10 applicable to the class herein represented as of the date of its *per curiam* opinion on May 12, 1969, rather than the proposed effective date of October 1, 1969. The provision herein with regard to the requirement of a fair hearing prior to suspending or reducing the aid to recipients of Aid to Families with Dependent Children shall have no application to across the board reductions necessarily made in good faith by the Department of Public Welfare. In the event this judgment is not promptly

complied with, this Court will entertain a request for injunctive relief.

(3). The practice of the defendants in applying §2642.60 of the Texas State Department of Public Welfare's Manual of Services to terminate or suspend aid to recipients of Aid to Families with Dependent Children violates the Social Security Act, Title 42 U.S.C. §301 et seq., and the regulations thereunder. This is not to mean that the defendants may not decrease the benefits of a recipient of Aid to Families with Dependent Children by the amount of financial support actually supplied by a "'substitute father" or a "man in the house".

(4) The intervenor, Ladislado Lupe Torres, shall be restored to the welfare rolls of the State of Texas, if otherwise eligible, and the defendants shall pay to the named plaintiff, Margarita Machado, and the intervenor, Ladislado Lupe Torres, all past benefits for which they were eligible as recipients of Aid to Families with Dependent Children, but which were unjustly withheld from them. These benefits may be decreased by the amount of financial support actually supplied by a "substitute father" or a "man in the house".

(5) The plaintiff, Margarita Machado, and the intervenor herein, Ladislado Lupe Torres, properly represent a class pursuant to Rule 23 of the Federal Rules of Civil Procedure, composed of all other recipients of public assistance from the Texas State Department of Public Welfare who are similarly situated. The relief of the class shall not apply retroactively but rather prospectively in that, effective May 12, 1969, all recipients of public

assistance from the Texas State Department of Public Welfare, comprising the class herein represented, who request a hearing, and all such recipients who had a hearing pending on said date, shall have their assistance continued during the period of the appeal and through the end of the month in which the final decision after the hearing is reached.

(6) The plaintiff, Margarita Machado, and intervenor, Ladislado Lupe Torres, shall recover from the defendants their costs of this suit, to be taxed by the Clerk of the Court.

Dated this 10 day of June, 1969.

ADRIAN A. SPEARS
United States District Judge, acting for and on behalf of all three judges designated to hear and determine this cause, with full authority from each judge to so act.

APPENDIX C

ARTICLE 695(c), SEC. 25 VERNON'S TEXAS CIVIL STATUTES, 1925 AS AMENDED

(1) In the event that an application for public assistance by a needy blind person, a needy aged person, or with respect to a needy dependent child, is not acted upon by the local unit of administration within a reasonable time after the filing of such an application, or is denied in whole, or in part, or any award of assistance is modified or cancelled, or an applicant or recipient is dissatisfied with any action or failure to act on the part of the local administrative unit, the applicant or recipient shall have the right to appeal to the State Department and shall be granted a reasonable notice and opportunity for a fair hearing before the State Department.

(2) Within a reasonable time prior to an applicant's or recipient's appeal hearing he, or his authorized agent, shall be fully advised of the information contained in his record on which action was based if a request for such information is made in writing, and no evidence of which the applicant or recipient is not informed shall be considered by the State Department as the basis for a decision after a hearing.

APPENDIX D

ARTICLE III, SEC. 51
CONSTITUTION OF TEXAS

The Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever; provided, however, the Legislature may grant aid to indigent and disabled Confederate soldiers and sailors under such regulations and limitations as may be deemed by the Legislature as expedient, and to their widows in indigent circumstances under such regulations and limitations as may be deemed by the Legislature as expedient; to indigent and disabled soldiers, who, under special laws of the State of Texas, during the war between the States, served in organizations for the protection of the frontier against Indian raids or Mexican marauders, and to indigent and disabled soldiers of the militia who were in active service during the war between the States, and to the widows of such soldiers who are in indigent circumstances, and who are or may be eligible to receive aid under such regulations and limitations as may be deemed by the Legislature as expedient; and also grant for the establishment and maintenance of a home for said soldiers and sailors, their wives and widows and women who aided in the Confederacy, under such regulations and limitations as may be provided for by law; provided the Legislature may provide for husband and wife to remain together in the home. There is hereby levied in addition to all other taxes heretofore permitted by the Constitution of Texas, a State ad valorem tax on property

of seven ($.07) cents on the one hundred ($100) dollars valuation for the purpose of creating a special fund for the payment of pensions for services in the Confederate army and navy, frontier organizations and the militia of the State of Texas, and for the widows of such soldiers serving in said armies, navies, organizations or militia; provided that the Legislature may reduce the tax rate herein levied, and provided further, that the provisions of this section shall not be construed so as to prevent the grant of aid in cases of public calamity.

APPENDIX E

ARTICLE III, SEC. 51a, CONSTITUTION OF TEXAS AS AMENDED AUGUST 5, 1969

The Legislature shall have the power, by General Laws, to provide, subject to limitations herein contained, and such other limitations, restrictions and regulations as may by the Legislature be deemed expedient, for assistance grants to and/or medical care for, and for rehabilitation and any other services included in the federal laws as they now read or as they may hereafter be amended, providing matching funds to help such families and individuals attain or retain capability for independence or self-care, and for the payment of assistance grants to and/or medical care for, and for rehabilitation and other services to or on behalf of:

"(1) Needy aged persons who are citizens of the United States or non-citizens who shall have resided within the boundaries of the United States for at least twenty-five (25) years;

"(2) Needy individuals who are totally and permanently disabled by reason of a mental or physical handicap or a combination of physical and mental handicaps;

"(3) Needy blind persons;

"(4) Needy dependent children and the caretakers of such children.

"The Legislature may prescribe such other eligibil-

ity requirements for participation in these programs as it deems appropriate.

"The Legislature shall have authority to enact appropriate legislation which will enable the State of Texas to cooperate with the Government of the United States in providing assistance to and/or medical care on behalf of needy persons, in providing rehabilitation and any other services included in the federal laws making matching funds available to help such families and individuals attain or retain capability for independence or self-care, to accept and expend funds from the Government of the United States for such purposes in accordance with the laws of the United States as they now are or as they may hereafter be amended, and to make appropriations out of state funds for such purposes; provided that the maximum amount paid out of state funds to or on behalf of any needy person shall not exceed the amount that is matchable out of federal funds; provided that the total amount of such assistance payments only out of state funds on behalf of such individuals shall not exceed the amount of Eighty Million Dollars ($80,000,000) during any fiscal year.

"Supplementing legislative appropriations for assistance payments authorized by this Section, the following sums are allocated out of the Omnibus Tax Clearance Fund and are appropriated to the State Department of Public Welfare for the period beginning September 1, 1969 and ending August 31, 1971: Three Million, Six Hundred Thousand Dollars ($3,600,000) for Old Age Assistance, Two Million, Five Hundred Thousand Dollars ($2,500,000) for Aid to the Permanently and Totally Disabled, and Twenty-Three Million, Nine Hundred Thousand Dollars ($23,900,000) for

Aid to Families with Dependent Children. Such allocations and appropriations shall be made available on the basis of equal monthly installments and otherwise shall be subject to the provisions of currently existing laws making allocations and appropriations for these purposes.

"Provided further, that if the limitations and restrictions herein contained are found to be in conflict with the provisions of appropriate federal statutes, as they now are or as they may be amended to the extent that federal matching money is not available to the state for these purposes, then and in that event the Legislature is specifically authorized and empowered to prescribe such limitations and restrictions and enact such laws as may be necessary in order that such federal matching money will be available for assistance and/or medical care for or on behalf of needy persons.

"Nothing in this Section shall be construed to amend, modify or repeal Section 31 of Article XVI of this Constitution; provided further, however, that such medical care, services or assistance shall also include the employment of objective or subjective means, without the use of drugs, for the purpose of ascertaining and measuring the powers of vision of the human eye, and fitting lenses or prisms to correct or remedy any defect or abnormal condition of vision. Nothing herein shall be construed to permit optometrists to treat the eyes for any defect whatsoever in any manner nor to administer nor to prescribe any drug or physical treatment whatsoever, unless such optometrist is a regularly licensed physician or surgeon under the laws of this state."

APPENDIX F

TITLE 45—PUBLIC WELFARE

CHAPTER II
SOCIAL AND REHABILITATION SERVICE (ASSISTANCE PROGRAMS), DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

PART 205
GENERAL ADMINISTRATION-PUBLIC ASSISTANCE PROGRAMS

Notice of proposed regulations for the programs administered under Titles I, IV—Part A, X, XIV; XVI, or XIX of the Social Security Act with respect to fair hearings—legal services, continuing assistance, was published in the *Federal Register* on November 30, 1968 (33 F.R. 17853). After consideration of the views presented by interested persons, the regulations as proposed, with a change providing for use of the services of law students, are hereby adopted. Accordingly, a new § 205.10 is added to Part 205, Chapter II of Title 45 of the Code of Federal Regulations as set forth below (effective on the date of publication in the *Federal Register*):

§ 205.10 Fair hearings: legal services; continuing assistance.

(a) *State plan requirements.* Effective October 1, 1969, a State plan for OAA, AFDC, AB, APTD, AABD, or MA under the Social Security Act must provide that:

(1) When a fair hearing is requested because of termination or reduction of assistance, involving an issue of fact, or of judgment relating to the individual

case, between the agency and the appellant, assistance will be continued during the period of the appeal and through the end of the month in which the final decision on the fair hearing is reached. (If assistance has been terminated prior to timely request for fair hearing, assistance will be reinstated.) Where delays are occasioned during the period of the appeal, assistance will be continued if the delay is at the instance of the agency or because of illness of the claimant or for other essential reasons. To the extent that there are other delays at the request of the claimant the agency may but is not required to continue assistance.

(2) The services of lawyers will be made available to welfare applicants and recipients who desire them in fair hearings. This may be done through legal service projects under the Office of Economic Opportunity, Legal Aid, or other organizations making legal services available; or through enabling the appellant to engage an attorney or be assigned an attorney in accordance with the procedures of the local Bar Association; or through the use of law students acting under the supervision of a law teacher or of a legal services organization. Appropriate fee schedules are established or other methods are developed to assure legal representation when desired. Attorneys on the staff of the welfare agency may not be used to represent the claimant at fair hearings. States are not required to pay to the extent that adequate services are available without cost to the State agency.

(b) *Federal financial participation.* Federal financial participation is available in:

(1) Cost for services of lawyers, under the adult categories to represent welfare clients in fair hearings,

at the 75 percent rate, if the State has an approved services plan for the adult categories. The 50 percent rate would be applicable if the State has no approved plan for services in the adult categories.

(2) Cost for services of lawyers, under Title IV, Part A, to represent clients in fair hearings, at the 85 percent rate to July 1, 1969, and at the 75 percent rate thereafter.

(3) Cost for legal services at the applicable rate for clients pursuing judicial review of a fair hearing decision.

(Sec. 1102, 49 Stat. 647, 42 U.S.C. 1302)

Dated: January 15, 1969.

JOSEPH H. MEYERS,
Acting Administrator,
Social and Rehabilitation Service.

Approved: January 17, 1969.

WILBUR J. COHEN,
Secretary.

(F.R. Doc. 69—974; Filed, Jan. 23, 1969; 8:51 a.m.)

APPENDIX G

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D. C. 20201

10-2(C-1)
SRS PROGRAM REGULATION 30-1(C-2)
August 23, 1969

TO:

STATE ADMINISTRATORS AND OTHER INTERESTED ORGANIZATIONS AND AGENCIES

SUBJECT:

Titles I, IV-Part A, X, XIV, XVI and XIX of the Social Security Act: Fair Hearings—Legal Services; Continuing Assistance

CONTENT:

Amendments of Parts 205 and 220 of Chapter II of Title 45 of the Code of Federal Regulations which change the effective date from October 1, 1969 to July 1, 1970 on the mandatory requirements for (1) continuing assistance to recipients pending fair hearing where assistance is being terminated or reduced and there is an issue of fact, or of judgment relating to the individual case, and (2) for making the services of lawyers available to welfare applicants and recipients who desire them in fair hearings. The regulations affected are 45 CFR 205.10(a) and 220.25(a).

EFFECTIVE DATE:

The regulations are effective on the date of publication in the *Federal Register*: August 23, 1969.

BACKGROUND:

The final policy on this subject was published in the *Federal Register* (34 F.R. 1144) on January 24, 1969, and issued as SRS Program Regulation 10-2 on the same date. The final policy relating to AFDC services was published on January 28, 1968 and issued as SRS Program Regulation 30-1.

Note: The attachment to State Letter No. 1053, dated 11/8/68, "Legal Services for the Poor", contains reference to the effective date of mandatory legal services on pp. 2 and 3 which is superseded by these amendments. Appropriate revisions in the State Letter will be made as soon as possible.

INQUIRIES TO:

SRS Regional Commissioners.

MARY E. SWITZER
Administrator

TITLE 45—PUBLIC WELFARE

CHAPTER II—SOCIAL AND REHABILITATION SERVICE (ASSISTANCE PROGRAMS), DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

PART 205—GENERAL ADMINISTRATION - PUBLIC ASSISTANCE PROGRAMS

PART 220—SERVICE PROGRAMS FOR FAMILIES AND CHILDREN: TITLE IV PARTS A AND B OF SOCIAL SECURITY ACT

FAIR HEARINGS: LEGAL SERVICES; CONTINUING ASSISTANCE

Parts 205 and 220 are amended as follows:

1. The introductory material to Section 205.10(a) is amended to read as follows:

Section 205.10 Fair Hearings: legal services, continuing assistance.

(a) *State plan requirements.* Effective July 1, 1970, a State plan for OAA, AFDC, AB, APTD, AABD, or MA under the Social Security Act must provide that:

* * * * *

2. Section 220.25(a) is revised to read as follows:

(a) Effective July 1, 1970, legal services must be made available to families who desire the assistance of lawyers at fair hearings and appropriate fee schedules or other methods must be established to assure legal representation when desired.

(Sec. 1102, 49 Stat. 647, 42 U.S.C. 1302)

Effective date. These amendments shall become effective on the date of publication in the *Federal Register.*

Dated: August 19, 1969.

MARY E. SWITZER
Administrator, Social and
Rehabilitation Service

Approved: August 20, 1969.

ROBERT H. FINCH
Secretary

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 1 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 553

BURTON G. HACKNEY, Commissioner of Public Welfare, State of Texas *et al.*,
Appellants

against

MARGARITA MACHADO, *et al.*,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT FOR THE WESTERN DISTRICT OF TEXAS

MOTION TO AFFIRM OR DISMISS

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TABLE OF CASES AND AUTHORITIES

CASES:

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Kelly v. Wyman, No. 62, O.T. 1969

King v. Smith, 392 U.S. 309 (1968)

Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)

Londoner v. Denver, 210 U.S. 373 (1908)

Opp Cotton Mills v. Administrator, 312 U.S. 126

OPP Cotton Mills v. Administrator, 312 U.S. 126 (1941)

United States v. Illinois Central R.R., 291 U.S. 457, 463 (1934)

OTHER AUTHORITIES:

Social Security Act, Title 42 USC 1301 et seq.

Article III, Sec. 51 (a)

Article 695 (c) Texas Revised Civil Statutes annotated

Rutgers Law and the Welfare State, 59 Columbia Law Review 143, 156 (1959)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 553

BURTON G. HACKNEY, Commissioner of Public Welfare, State of Texas *et al.*,

Appellants,

versus

MARGARITA MACHADO, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

MOTION TO AFFIRM OR DISMISS

Appellee moves the Court to affirm the Judgment sought to be reviewed on appeal or in the alternative, to note probable jurisdiction and set this case down for argument with *Wheeler v. Montgomery*, No. 11, O.T. 1969, and *Kelly v. Wyman*, No. 62, O.T. 1969, or in the alternative to dismiss Appellants' appeal, on the grounds set forth below.

QUESTIONS PRESENTED

Appellee contends that the questions presented are adequately stated in Appellants' Notice of Appeal to the Supreme Court of the United States, filed on July 7, 1969, and attached hereto as Appendix A; however, appellee wishes to exercise her prerogative

and restate the questions presented in the following manner:

1. Whether the State Department of Public Welfare, having found after fulsome investigation an individual or family to be needy and in all other respects eligible within the statutory and regulatory scheem for public assistance, and having accordingly provided a regular recurring public assistance grant for food, clothing, shelter and medical services, may, consistent with the purposes and provisions of the Social Security Act, Title 42 U.S.C. §301 *et seq.* and the regulations thereunder redetermine eligibility *ex parte* and abruptly withdraw the subsistance grant without affording the individual so affected an adequate and timely opportunity to be heard on the highly controvertable issues underlying the decision to terminate?

2. Whether a mere confrontation between the welfare recipient and the case worker whereby the latter, after *ex parte* having determined that the former is no longer eligible for public assistance, informs the former of his decision, and whereby the former at which time has no adequate or timely notice, no opportunity to have the benefit of legal counsel, and no adequate opportunity to effectively present his issues or defenses, is a fair hearing as contemplated by the purposes and provisions of the Social Security Act, Title 42 U.S.C. §301, *et seq.* and whether the welfare recipients' public assistance being terminated at the time of the case worker's *ex parte* determination of non-eligibility affords the recipient adequate protection pending the time of a fair hearing and final determination as envisioned

by the purposes and provisions of the Social Security Act, Title 42 U.S.C. §301 *et seq.*"

STATEMENT OF THE CASE

Appellee, Margarita Machado; herein is a recipient of public assistance grants under the federally financed Aid for Dependent Children (AFDC) program, governed by Title IV of the Social Security Act and H.E.W. regulations thereunder, and the State financed program Article III §51a, Constitution of Texas and Article 695 (c), Texas Revised Civil Statutes Annotated. Both programs are a co-operative effort which provide a monthly recurring grant of money for shelter, clothing and food costs for persons who meet the intricate statutory and regulatory qualifications and who are wholly without adequate resources or other means of support and thereby come within the statutory and regulatory definition of needy.

The Appellee herein was found, after investigation and verification, to be fully eligible to receive subsistance grants, and regular recurring grants were paid continuously from December of 1966, until December 31, 1967.

On or about December 6, 1967, Appellee, who had been receiving a public assistance grant of $85.00 per month was contacted by an employee-agent of Appellants, who informed the Appellee that her AFDC public assistance was being terminated and that she was not entitled to receive further assistance because of the fact that she was supposedly in violation of the "man in the house" or "substitute father" regulation.

Appellee did not receive any assistance for the months of January, 1968, and February, 1968, at which time she sought legal counsel, who advised her to make a new application to the Texas State Department of Public Welfare. As a result of such new application, the Appellee was reinstated by the Appellants effective the month of March, 1968, the first new assistance grant being received by her in April, 1968. Also in April, 1968, Appellee petitioned Appellants for an appeal concerning her wrongful termination. An appeal hearing was held in May, 1968, and the matter was considered by the Appeal Board in June, 1968, at which time the action of the case worker was sustained inspite of the evidence showing that although Appellee did have intimate relations with a man from time to time, this man was not contributing to her or her family's support. In April, 1968, Appellee filed her suit herein in the U.S. District Court, Western District of Texas, seeking injunctive and declaratory relief. The case was heard on June 20, 1968, by a three-judge panel which had been specially convened. The three-judge Court issued a *per curiam* opinion on May 12, 1969, wherein it stated:

> "We agree with the results reached in the *Kelly* case, but our holding is predeciate upon the statutory-regulatory aspects of this case, rather than on broad constitutional grounds. See *King v. Smith*, supra, at 313. Adequate protection to the recipient can only be accorded in situations such as those presented in the instant case, by a continuation of the assistance during the period of the appeal and through the end of the month in which the final decision, after the hearing is reached." *Machado, et al v. Hackney, et al*, Civ. No. 68-108, SAC W. D. Texas. (May 12, 1969).

On June 10, 1969, the Court entered its judgment wherein it declared Article 695 (c) §25 and the regulations issued pursuant thereto which authorized and required termination, suspension or reduction of AFDC without affording said recipients a prior hearing, and without affording said recipients a continuation of assistance during the period of appeal and through the end of the month in which the final decision after the hearing is reached, violated the Social Security Act, Title 42 U.S.C., §301 *et seq.* and the regulations promulgated thereunder.

ARGUMENT

The statute and regulations issued pursuant thereto found invalid below are plainly invalid under the prior decision of this Court.

The decision below held that the state statute and the regulation issued pursuant thereto which required termination of public assistance without a prior fair hearing violated the Social Security Act, Title 42 U.S.C. §301 *et seq.* The decision of the Court below was manifestly correct and therefore poses no issue worthy of plenary review in this Court.

Appellants contend that a welfare recipient is entitled to receive benefits only so long as he is a member of a class of persons as defined by Art III, 51a of the Texas Constitution. Appellee agrees with Appellants on this point as far as it goes, however, there is a substantial disagreement as to what point in time a welfare recipient ceases to be a member of the above mentioned class.

Appellants contend that a welfare recipient ceases to be a member of that class when a case worker of the

State Department of Public Welfare has determined, after an *ex parte* investigation, that the welfare recipient is no longer eligible for public assistance and informs the recipient of his decision. Conversly, Appellee contends that after an individual has been fully investigated and found to be eligible by the State Department of Public Welfare and thereby has been qualified in every way to receive public assistance and has received the same in recurrent periodic payments, then such an individual's public assistance grant cannot be terminated by mere arbitrary fiat on the part of the State, but rather such action must be in accordance with the purposes and provisions of the Social Security Act, Title 42 U.S.C., §301 *et seq.*

The welfare recipient has a right to continue to receive public assistance until after a fair hearing and final determination. After that point in time if the welfare recipient is adjudged ineligible, public assistance would of course cease. The disagreement apparently is that appellants consider the welfare recipient to cease to be a member of the said class at that point in time when the said case worker has so decided and informs the recipient of his decision; whereas, Appellee believes that the welfare recipient once legally qualified as a member of the said class continues to be a member of the said class until a final decision to the contrary has been made after a fair hearing. Of course, this presupposes that the welfare recipient disagrees with the case worker's decision and duly files an appeal. Appellee in no way contends that the welfare recipient cannot acquiesce in the case worker's determination by not filing an

appeal. Appellee submits that when the welfare recipient does disagree with the case worker's determination and duly files an appeal, then as the lower court stated:

> "Adequate protection to the recipient can only be accorded . . . by a continuation of the assistance during the period of the appeal and through the end of the month in which the final decision, after the hearing, is reached."

Evidently, the lower Court was aware of the fact that, in order to carry out the purposes and provisions of the Social Security Act, Title 42 U.S.C. §301 *et seq*, it is necessary to assure all citizens the right to a fair hearing which provides them with adequate protection when their bare subsistance is at stake.

Appellants would lead this Court to believe that funds are being paid out in wholesale amounts to individuals who are not members of the said class, and further that this determination of non-membership can be correctly and justly determined by the case worker in an *ex parte* proceeding. The facts, however, do not substantiate such a contention. First of all less than one per cent (.0074) of the recipients who are informed by their case workers that they are no longer eligible and their public assistance will be terminated ever file an appeal. During the year of 1967 this amounted to a total of 644 appeals out of which the case worker was sustained in 227 cases and reversed in 368 cases. In other words, Appellants' contention of the justness and correctness of the case workers *ex parte* decision (what Appellants term the initial hearing) has proven wrong more often than right. Meanwhile, Appellants admit that

the total average lapse of time between a recipient filing an appeal and the implementation of the decision of such an appeal in the case of a reversal is approximately four months (117 days). Without continued assistance during the appeal process, as found necessary by the lower Court, the welfare recipient is faced with lack of adequate food, shelter, clothing and medical care, and then the aid, when it comes (117 days later), may be too late in that it cannot erase the damage that has already been done such as a family breaking up, a boy succumbing to crime in order to feed his family, or a baby dying of malnutrition.

Appellants contend that welfare recipients receive a double hearing in that they blatantly term the case worker's *ex parte* determination of non-eligibility and his notification to the recipient of the same a hearing. Appellee contends that in no sense of the word can the above procedure be a fair hearing as envisioned by the Social Security Act, Title 42 U.S.C. §301 *et seq*, more specifically 42 U.S.C. §602(a)(4).

> "A state plan for aid and services to needy families with children must . . . provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for Aid to Dependent Children is denied or not acted upon with reasonable promptness."

To abruptly terminate the recipient's assistance grant during a period of some four months between appeal, final adjudication and reinstatement of a grant upon reversal of the case worker, is to place the recipient in dire jeopardy. Even if the recipient is right and the case worker wrong (and by Ap-

pellant's own appeal figures this is more often than not the case), the recipient must endure without a grant on which his very subsistance depends. Such a situation does not foster the purpose and intent of the Social Security Act, Title 42 U.S.C. §301 *et seq*, nor does it afford the recipient adequate safeguards and protection.

The conflict of the hearing officer-case worker's conception of the efficient handling of his cases when combined with his concern for protecting his job and the needed safeguard of neutrality in an area of such critical concern as the termination of funds needed for survival is both obvious and fatal in terms of a fair hearing.

Appellants contend that the State Department of Public Welfare should be allowed to arbitrarily terminate the assistance grant of a recipient as long as said recipient is given the opportunity to demonstrate the rightness of her position four months after her assistance was cut off. Such a procedure is the essence of arbitrary action. The lower Court held that the only way to adequately protect the claimant of public assistance was by granting her reasonable notice and opportunity for a fair hearing prior to termination of benefits.

To allow the welfare department to act without such restraint is to tolerate "the play and action of purely personal and arbitrary power", *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) and to leave "one man subject in his essectial interests to the arbitrary will of another man who happens to partake of public power." H. W. Jones, *The Rule of Law and the Wel-*

fare State, 58 Columbia Law Review 143, 156 (1958).

To minimize such arbitrary power and limit arbitrary action, this Court has repeatedly held that where the individual's "essential interests" are at stake, final government action must await opportunity for a hearing. The Court met this issue as early as 1908 in *Londoner v. Denver*, 210 U.S. 373 (1908), which involved the assessment of a municipal street-improvement tax. The taxpayer had the right to be heard "before the tax became irrevocably fixed". 210 U.S. at 385. In *Opp Cotton Mills v. Administrator*, 312 U.S. 126 (1941), the Court, in upholding the application of the minimum wage standards of the Fair Labor Standards Act to a textile manufacturer, stated that due process does "not require a hearing at the initial stage or at any particular point . . . in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." 312 U.S. at 152-53. Accord, *United States v. Illinois Central R.R.* 291 U.S. 457, 463, (1934).

II.

There is presently pending before this Court two cases which contain basically the same issues as presented in the instant case. They are *Wheeler v. Montgomery*, No. 14 O.T. 1969, and *Kelly v. Wyman*, No. 62 O.T. 1969.

In the *Wheeler* case, the three-judge Court in construing the California practice of terminating assistance to welfare recipients after a confrontation

by the case worker prior to the recipient being given a fair hearing, found that the procedure violated neither the Social Security Act, Title 42 U.S.C. §301 *et seq*, nor the United States Constitution. The three-judge Court in the *Kelly* case, however, faced with almost the exact set of circumstances found that the practice in New York City denied the recipients due process as guaranteed by the Fourteenth Amendment of the United States Constitution. The three-judge Court in the instant case agreed with the results reached in the *Kelly* case but predicated their holding on the statutory-regulatory aspects of the case rather than on broad Constitutional grounds citing *King v. Smith*, 392 U.S. 309 (1968).

Since all three cases deal with the same issues and questions, all three cases should be heard together. However, if the Court fails to set the instant case down for argument with *Wheeler v. Montgomery*, No. 14 O.T., 1969, and *Kelly v. Wyman*, No. 62 O.T., 1969, then Appellee respectfully moves that the Court should dismiss Appellants' appeal in the instant case. By Appellants' own contention, the issues here are substantially the same as in the *Wheeler* and *Kelly* cases. Since the *Wheeler* and *Kelly* cases are advanced on the Dockets of this Court and without the instant case being set down to be heard along with the *Wheeler* and *Kelly* cases, the *Wheeler* and *Kelly* cases will surely be heard before the instant case, and since a determination in the *Wheeler* and *Kelly* cases would be controlling in the instance case thereby making the issues in the instant case moot, Appellee respectfully urges that the Court dismiss the appeal in this case.

CONCLUSION

Appellee's motion to affirm should be granted, or in the alternative, probable jurisdiction should be noted and the case set down to be heard along with *Wheeler v. Montgomery*, No. 14 ..... O.T., 1969, and *Kelly v. Wyman*, No. 62 ..... O.T., 1969, or in the alternative Appellee's motion to dismiss the appeal in this case should be granted.

Respectfully submitted,

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Of Counsel

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MARGARITA MACHADO, individually and on behalf of her minor children and on behalf of needy, dependent children similarly situated, *Plaintiffs,* VS BURTON G. HACKNEY, Commissioner of Public Welfare, State of Texas, WILL BOND, Chairman of the State Board of Public Welfare, State of Texas; W. KENDALL BAKER, Vice-Chairman of the State Board of Public Welfare, State of Texas; and RAYMOND CHEEVES, Director of Region 4 of the State Department of Public Welfare, State of Texas, *Defendants*	CIVIL ACTION FILE NO: 68-108-SA

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I.

Notice is hereby given that BURTON G. HACKNEY, Commissioner of Public Welfare, State of Texas; WILL BOND, Chairman of the State Board of Public Welfare, State of Texas; W. KENDALL BAKER, Vice-Chairman of the State Board of Public Welfare, State of Texas; and RAYMOND CHEVES, Director of Region 4 of the State Department of Public Welfare, State of Texas; Defendants in the above styled and numbered cause, hereby appeal to the Supreme Court of the United States from the judgment entered in this action on the 10th day of June, 1969. This appeal is taken pursuant to 28 U.S.C. §1253.

II.

The portion of the judgment appealed form by Defendants herein is Paragraph 1, Paragraph 2, and Paragraph 5 which requires the Department of Public Welfare of the State of Texas, to keep recipients of Aid for Dependent Children on the Welfare rolls during the entire period of the administrative appeal, and through the end of the month in which the final decision is reached.

III.

The clerk will please prepare a transcript of the record of this cause for transmission to the clerk of the Supreme Court of the United States and include in said transcript the following:

(1) All pleadings filed in this cause by Plaintiffs, Intervenors, and Defendants.

(2) All stipulations filed in this cause.

(3) All depositions filed in this cause.

(4) Per Curiam opinion of the Court dated the 12th day of May, 1969.

(5) Judgment of the Court dated June 10, 1969.

(6) This notice.

IV.

The following questions are presented by this appeal;

(1) Whether that portion of Article 695 (c) Section 25 of Vernon's Texas Civil Statutes, and the regulations issued pursuant thereto by Defendant, which authorizes and requires termination, suspension or reduction of aid to recipients for Aid for Dependent Children during administrative appeal violates the Social Security Act, 42 U.S.C. Section 301, *et seq*, and the regulations promulgated thereunder.

(2) Whether that portion of Article 695 (c) Section 25 of Vernon's Texas Civil Statutes and regulations issued pursuant thereto by Defendants, which authorizes and requires termination, suspension or reduction of aid to recipients for Aid for Dependent Children during administrative appeal, deprives Plaintiff, MARGARITA MACHADO and Itervenor, LADISLADO LUPE TORRES, of equal protection of the laws secured by the due process clause of the 14th Amendment to the United States Constitution, or whether Article 695 (c) Section 25

Vernon's Texas Civil Statues and the regulations issued pursuant thereto constitute a valid exercise of legislative power.

(3) Whether that portion of Article 695 (c) Section 25 Vernon's Texas Civil Statutes and the regulations issued pursuant thereto by Defendant, which authorizes and requires termination, suspension or reduction of Aid to Recipients for Aid for Dependent Children during administrative appeal, affords a fair hearing to recipients for Aid for Dependent Children or whether the same deprived Plaintiff, MARGARITA MACHADO and Intervenor, LADISLADO LUPE TORRES, of any rights protected by the United States Constitution.

(4) Whether the Lower Court has the right and authority to compel the Comptroller of Public Accounts of the State of Texas to issue a warrant on the Treasury of the State of Texas when such issuance does not have support by pre-existing law required by Section 44 of Article III of the Constitution of the State of Texas and Section 5 or Article VIII of the Constitution of Texas.

CRAWFORD C. MARTIN
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NOLA WHITE
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